

The Honorable Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHANIE M. GAMBINI,)	
)	NO. C03-5459 RBL
Plaintiff,)	
)	PLAINTIFF'S MOTION
vs.)	IN LIMINE TO EXCLUDE
)	EVIDENCE OF PLAINTIFF'S
TOTAL RENAL CARE, INC., d/b/a))	PRIOR EMPLOYMENT
DaVita, Inc., a California corporation,)	
)	
Defendant.)	Note Date: November 26, 2004

Pursuant to Fed. Rs. Evid. 401-404 and 608(b), plaintiff moves to exclude from evidence at trial: (1) All evidence related to her request for accommodation and the circumstances surrounding the termination of her employment at Loudeye Technology; and (2) Her worker's compensation claim related to her knee injury at Loudeye Technology.

Prior to being hired at DaVita, Ms. Gambini was employed for approximately eight months at Loudeye Technology, fka Encoding.com (hereinafter "Loudeye"). While working for Loudeye, Ms. Gambini suffered a knee injury and filed a worker's compensation claim. Her health care provider restricted her to light duty work and imposed restrictions

PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF PLAINTIFF'S PRIOR EMPLOYMENT -1
[C03-5459 RBL]

G:\Gambini\mtns.limine.wpd

FRANK FREED
SUBIT & THOMAS LLP
SUITE 1200 HOGE BUILDING, 705 SECOND AVENUE
SEATTLE, WASHINGTON 98104-1798
(206) 682-6711

1 on her physical capabilities. Loudeye initially indicated that they did not have any light
 2 duty positions available that were consistent with the restrictions imposed by Ms. Gambini's
 3 physician and that it was unable to reasonably accommodate her. Ms. Gambini made a
 4 written request for a medical leave of absence, which was granted. Although she was
 5 eligible for rehire at Loudeye, Ms. Gambini did not return to work there and was
 6 subsequently hired by DaVita. During discovery in this matter, defendant deposed Ms.
 7 Gambini and another witness, Pam Tellevick, about Ms. Gambini's request for reasonable
 8 accommodation and the circumstances surrounding the termination of her employment at
 9 Loudeye.
 10
 11

12 **1. Evidence Related to Ms. Gambini's Request for Accommodation At**
 13 **Loudeye is Irrelevant to the Issues in this Case**

14 Pursuant to Federal Rules of Evidence 401 and 402, plaintiff moves to exclude all
 15 evidence related to her request for accommodation from her previous employer and the
 16 circumstances surrounding the termination of her employment at Loudeye. All such
 17 evidence is irrelevant to the issues of whether DaVita failed to reasonably accommodate
 18 Ms. Gambini's disability and whether DaVita discriminated against her on the basis of
 19 disability in violation of the Washington Law Against Discrimination, RCW 49.60.
 20

21 DaVita's motives and intent are at issue in this case, not Ms. Gambini's.
 22 Consequently, all evidence related to Ms. Gambini's employment at Loudeye should be
 23 excluded under Rules 401 and 402.

24 Defendant has suggested that it may seek to introduce evidence of Ms. Gambini's
 25 request for accommodation from Loudeye in an attempt to portray her as a malinger or
 26

27 **PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE**
EVIDENCE OF PLAINTIFF'S PRIOR EMPLOYMENT -2
 [C03-5459 RBL]
 G:\Gambini\mntns.limine.wpd

FRANK FREED
 SUBIT & THOMAS LLP
 SUITE 1200 HOGE BUILDING, 705 SECOND AVENUE
 SEATTLE, WASHINGTON 98104-1798
 (206) 682-6711

1 litigious person with a history of frivolous employment disputes. Fed. R. Evid. 404(b)
2 provides, in pertinent part:

3 Evidence of other crimes, wrongs, or acts is not admissible prove the
4 character of a person in order to show action in conformity therewith. It
5 may, however, be admissible for other purposes, such as proof of motive,
6 opportunity, intent, preparation, plan, knowledge, identity, or absence of
mistake or accident..."

7 Rule 404(b) clearly prohibits the admission of evidence of Ms. Gambini's prior request for
8 accommodation at Loudeye for the purpose of attacking her character as a malinger or
9 litigious person. Furthermore, Ms. Gambini's request for accommodation and the
10 circumstances surrounding the termination of her employment with Loudeye are not
11 probative of motive, opportunity, intent preparation, knowledge, identity, or absence of
12 mistake in this case. At most, this evidence shows that Ms. Gambini was aware of and
13 attempted to assert her right to be reasonably accommodated in a previous employment
14 relationship and that employer failure to reasonably accommodate disabilities is not an
15 isolated occurrence.
16

17
18 Even if, *assuming arguendo*, Ms. Gambini's prior request for accommodation at
19 Loudeye was deemed marginally relevant to some issue in this case, the Court should
20 exclude such evidence under Fed. R. Evid. 403 because it would waste time, confuse the
21 issues and could unfairly prejudice the jury. Admission of evidence at trial related to Ms.
22 Gambini's request for accommodation at Loudeye would necessitate a mini-trial within the
23 trial to determine whether Ms. Gambini was justified in requesting an accommodation and
24 whether Loudeye failed reasonably to accommodate her disability. This evidence would
25

26
27 PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF PLAINTIFF'S PRIOR EMPLOYMENT -3
[C03-5459 RBL]

G:\Gambini\mntns.limine.wpd

FRANK FREED
SUBIT & THOMAS LLP
SUITE 1200 HOGE BUILDING, 705 SECOND AVENUE
SEATTLE, WASHINGTON 98104-1798
(206) 682-6711

confuse the issues before the jury and needlessly waste time. Furthermore, there is a danger that evidence of Ms. Gambini's prior request for accommodation could unfairly prejudice the jury and create the impression that Ms. Gambini is litigious. The prejudicial effect of this evidence substantially outweighs any possible probative value. Accordingly, all evidence of Ms. Gambini's request for accommodation and the circumstances surrounding the termination of her employment at Loudeye should be excluded at trial.

2. Evidence Related to Ms. Gambini's Worker's Compensation Claim For Her Knee Injury At Loudeye Should Be Excluded

As set forth above, Ms. Gambini opened a worker's compensation claim in connection with her knee injury while she was employed at Loudeye. Pursuant to that worker's compensation claim, Ms. Gambini received medical treatment and time loss benefits prior to being hired by DaVita. While Ms. Gambini was employed with DaVita, in June, 2002, she underwent surgery on the same knee. Ms. Gambini did not reopen her previous worker's compensation claim in connection with her knee surgery. Her medical expenses for the surgery were submitted to her health insurance carrier.

Defendant may seek to admit evidence that Ms. Gambini did not reopen her worker's compensation claim in relation to her knee surgery in June 2002 to suggest or portray Ms. Gambini's as dishonest or fraudulent in character. Fed. R. Evid. 608(b), provides in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination of the witness (1)

PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF PLAINTIFF'S PRIOR EMPLOYMENT -4
[C03-5459 RBL]

G:\Gambini\mntns.limine.wpd

FRANK FREED
SUBIT & THOMAS LLP
SUITE 1200 HOGE BUILDING, 705 SECOND AVENUE
SEATTLE, WASHINGTON 98104-1798
(206) 682-6711

1 concerning the witness' character for truthfulness or untruthfulness...
 2 (emphasis added).

3 In this case, there is no evidence that Ms. Gambini was dishonest or untruthful in
 4 relation to insurance coverage of her knee surgery. Evidence of her prior worker's
 5 compensation claim at Loudeye should, therefore, be excluded under Fed. R. Evid. 608(b).

6 Furthermore, evidence of Ms. Gambini's worker's compensation claim at Loudeye
 7 would likely confuse and mislead the jury, and needlessly waste time. Accordingly,
 8 pursuant to Fed. R. Evid. 403, the Court should exclude all evidence related Ms. Gambini's
 9 worker's compensation claim at Loudeye.
 10

11 DATED this 15th day of November, 2004.

12 FRANK FREED SUBIT & THOMAS LLP

13
 14 By: Sean M. Phelan
 15 Michael C. Subit, WSBA #29819
 16 Sean M. Phelan, WSBA #27866
 17 Attorneys for Plaintiff Stephanie Gambini
 18
 19
 20
 21
 22
 23
 24
 25
 26

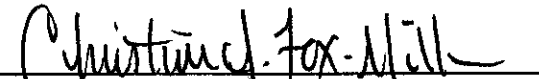
27 PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE
 EVIDENCE OF PLAINTIFF'S PRIOR EMPLOYMENT -5
 [C03-5459 RBL]
 G:\Gambini\mntns.limine.wpd

FRANK FREED
 SUBIT & THOMAS LLP
 SUITE 1200 HOGE BUILDING, 705 SECOND AVENUE
 SEATTLE, WASHINGTON 98104-1798
 (206) 682-6711

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2004, I electronically filed Plaintiff's Motion *In Limine* to Exclude Evidence of Plaintiff's Prior Employment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Patricia K. Buchanan and William R. Kiendl; and I hereby certify that I sent said document for hand-delivery on November 15, 2004, via ABC Legal Messengers to the following: Patricia K. Buchanan and Pamela J. DeVet, Lee Smart Cook Martin & Patterson, 1800 One Convention Place, 701 Pike Street, Seattle, WA 98101-3929.

DATE: November 15, 2004


CHRISTINE A. FOX-MILLER

PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF PLAINTIFF'S PRIOR EMPLOYMENT -6
[C03-5459 RBL]

G:\Gambini\mtns.limine.wpd

FRANK FREED
SUBIT & THOMAS LLP
SUITE 1200 HOGE BUILDING, 705 SECOND AVENUE
SEATTLE, WASHINGTON 98104-1798
(206) 682-6711